BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

KITSAP AUDUBON SOCIETY and MILLER BAY CITIZENS ACTION GROUP, Appellants, v. KITSAP COUNTY and D & S DEVELOPMENT COMPANY, Respondents	SHB NO. 92-19 ORDER GRANTING SUMMARY JUDGMENT

This is an appeal by the Kitsap Audubon Society and the Miller Bay Citizen Action Group of a Conditioned Substantial Development Permit issued by Kitsap County to D & S Development Company (D&S) for an eight lot subdivision on 9.63 acres, with tidelands fronting on Miller Bay in Puget Sound, Kitsap County, near Poulsbo, Washington.

The appeal, SHB No. 92-19, was filed with the Washington State Shorelines Hearings Board (Board) on May 4, 1992.

On July 22, 1992, respondent D&S moved for Summary Judgment, asserting that Kitsap County had no authority to require a substantial Development Permit for this project. Affidavits and exhibits were also filed.

Kitsap County, filed its response and affidavits opposing the Motion on July 31, 1992, and Kitsap Audubon Society and Miller Bay Citizen Action Group filed their response opposing the Motion on August 3, 1992.

D&S's Reply was filed on August 10, 1992. The Board heard oral argument on the motion August 12, 1992. Present were Annette S. McGee, Presiding; Board Chairman

I certify that I mailed a copy of this document to the persons and addresses listed thereon, postage prepaid, in a receptacle for United States mail at Lacey, Wa. on 9-22-92.

Harold S. Zimmerman, Nancy Burnett, Richard Gidley, David Wolfenbarger, and Board Administrative Law Judge John Buckwalter as legal advisor.

Court Reporter Leah M. Trissel of Spanaway, WA, recording the proceedings.

In considering a Motion for Summary Judgment, the Board must consider all the facts before it and all reasonable inferences from those facts in the light most favorable to the non-moving party. The motion can be granted only if the record demonstrates that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Wilson v. Steinback, 98 Wn.2d 434, 437 (1982).

The controlling facts are undisputed. In June, 1990, D&S Development applied to Kitsap County for a preliminary plat and planned unit development named Heron Cove. The proposed plat consisted of 11 lots, three of which were on the waterfront. The proposal also included a non-building open space tract encompassing a biological wetland.

The Kitsap County Hearing Examiner recommended approval with conditions, including a 175-foot natural vegetation buffer and a 200-foot setback from a heron rookery located in the wetland. However, the final decision of the County Commissioners on the preliminary plat and planned unit development eliminated one waterfront and two upland lots. The Commissioners also increased the buffer and setback to 225 feet and 250 feet, respectively. It is the approval of the Shoreline Substantial Development Permit that has been appealed to the Board.

RCW 90.58.140(2) provides for the issuance of substantial development permits by a local government:

> (2) A substantial development shall not be undertaken on shorelines of the state without first obtaining a permit from the government entity having administrative jurisdiction under this chapter.

The term "development" is defined in RCW 90.58.030(3)(d) as:

> A use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals' bulkheading; driving of pilings; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal use of the surface of the waters overlying lands subject to this chapter at any state of water level.

Under Kitsap County regulations, preliminary plat approval authorizes the applicant to construct the subdivision infrastructure, including roads, water and sewer or septic facilities and other subdivision infrastructure without the necessity for any further permits (such as clearing and grading permits). Thus, preliminary plat approval clearly results in the permitting of "development" as defined in the Shoreline Management Act. However, it is critical to note that in this case none of those subdivision improvements authorized by the preliminary plat are located within the "shoreline" as defined under the Shoreline Management Act.

RCW 90.58.030(d) and (f) definitions are:

> (d) "Shorelines" means all of the water areas of the state, including reservoirs, and their associated wetlands, together with the lands underlying them; . . . "

> (f) "Wetlands" or "wetland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all marshes, bogs, swamps, and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter . . . "

It is undisputed that all such improvements are located outside of any wetlands and more than 200 feet from the ordinary high-water mark.

Kitsap County and petitioners argue, however, that actual development within the statutorily-defined shoreline is not necessary to trigger the requirement for a substantial development permit where there is a single project which includes both shoreline and

non-shoreline areas. Relying primarily on Merkel v. Port of Brownsville, 8 Wn.App. 844 (1973), they argue that, in such a case, a substantial development permit is required even where the actual development occurs only in upland areas. In the Board's view, however, Merkel does not support that position. In Merkel, unlike this case, development was proposed within the shoreline (the construction of protected moorage facilities for recreational boats). As part of the same project, work was also to be undertaken in upland areas. Therefore, it was not disputed that there was development within the shoreline jurisdictional area which triggered the requirement for a substantial development permit. The issue, rather, was whether the applicant could proceed with any portion of a single project without first obtaining all approvals required under the Shoreline Management Act and the State Environmental Policy Act for the entire project. The court rejected this "piecemealing" approach, and held that no development should be undertaken until all necessary approvals were obtained. Merkel, supra, at 851.

There is no question in the present case that a substantial development permit would be required if plat infrastructure was actually to be constructed in the shoreline area. And, under Merkel, if that were the case, Kitsap County could refuse to allow any development in upland areas until that permit was issued. However, that issue does not even arise if there is not some proposed activity which "triggers" the requirement for a substantial development permit in the first place.

The real question is whether Kitsap County can require a substantial development permit for a project, a portion of which is under shoreline jurisdiction, but where no statutorily-defined development occurs within the shoreline area. We believe that it cannot. The Washington Supreme Court dealt with a related situation in Narrowsview Association v. Tacoma, 84 Wn.2d 416 (1974). There,the question was whether the reclassification of

property from single-family to planned residential development requires a substantial development permit. Reclassification can be distinguished from the plat in this case because, unlike a plat under Kitsap County regulations, a reclassification authorizes no development, either in the shoreline or in the upland. However, the language of the Court in deciding the case strongly suggests that the key to triggering the requirement for a substantial development permit is actual physical activity within the shoreline. Holding that no substantial development permit was required, the court stated, at p. 425:

> Here, unlike the facts of Merkel v. Port of Brownsville, 8 Wn. App. 844, 509 P.2d 390 (1973), there is no commencement of construction to prejudice subsequent decision-making or any other acts which would allow specific physical improvement being made on the land within 200 feet of the shoreline. [emphasis supplied]

This interpretation seems consistent with the language of RCW 90.58.140(2) which provides that there shall be no substantial development ". . .on shorelines of the state" without a shorelines permit. In this case, there is no development "on" the shoreline.

Parenthetically, we note that the power of Kitsap County to require a substantial development permit and its power to regulate under the Shoreline Management Act are not co-extensive. The requirement for a substantial development permit is just one regulatory tool that has been provided under the Shoreline Management Act. Through its Shoreline Master Program, functioning as use regulations, the County can regulate shoreline uses regardless of whether they meet the definition of development under the Act. See, Clam Shacks v. Skagit County, 109 Wn.2d 91, 95 (1987). Indeed, it appears that Kitsap County conditioned the plat on that basis in this case.

Our holding today is limited to the narrow question of whether a Shoreline Substantial Development Permit could be required under the facts of this case. We hold that it cannot.

Based on the foregoing, the Board makes the following

ORDER

The Motion for Summary Judgment is hereby GRANTED, and therefore, the appeal is DISMISSED, because Kitsap County lacks jurisdiction to require a Substantial Development Permit in this case.

SO ORDERED this 22nd day of September, 1992.

SHORELINES HEARINGS BOARD

Annette S. McGee
ANNETTE S. McGEE, Presiding

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Chairman

(See Concurring Opinion)
NANCY BURNETT, Member

Richard Gidley
RICHARD GIDLEY, Member

Dave Wolfenbarger
DAVE WOLFENBARGER, Member

S92-19SJ

CONCURRING OPINION - BURNETT

I concur with the conclusion of my colleagues regarding SHB No. 92-19. However, although the decision meets the strict legal interpretation of the law, some common sense suggests that we have violated the spirit of the law. At issue was the road to be constructed outside the shoreline jurisdiction. If this was not associated with future shoreline development, is it not a road leading to nowhere?

NANCY BURNETT, Member